



United States Department of the Interior
OFFICE OF THE SECRETARY
Washington, DC 20240

IN REPLY REFER TO:
7202.4-OS-2018-01470

August 30, 2019

Via email: 58976-62277911@requests.muckrock.com

Mr. Jimmy Tobias
MuckRock News
DEPT MR 58611
411A Highland Avenue
Somerville, MA 02144

Dear Mr. Tobias:

On August 3, 2018, you filed a Freedom of Information Act (FOIA) seeking the following:

All written or electronic communications, including attachments, between deputy director of external affairs Tim Williams, or his executive assistant(s), and any agent, representative or employee of the Sutherland Institute, a Utah based think tank. This request includes any and all communications between Williams, or his executive assistant, and any email address that ends in "@sifreedom.org". This request also seeks any communication between Tim Williams (or his assistant Jason Funes) and Sutherland Institute employee Matthew Anderson. This request seeks records produced between April 1, 2017 and the date this request is processed.

Your request was received in the Office of the Secretary FOIA office on August 03, 2018, and assigned control number **OS-2018-01470**. Please cite this number in any future correspondence or communications with the Office of the Secretary regarding your request. We are writing today to provide an interim response to your request on behalf of the Department of the Interior. The Office of the Secretary FOIA office reviewed 574 pages and found 38 pages were non-responsive. Please find attached one (1) file consisting of 536 pages. Of those 536 pages, 531 pages are being released in full and 5 pages contain redactions as described below.

Portions of the enclosed documents have been redacted pursuant to Exemption 6 of the FOIA (5 U.S.C. § 552(b)(6)) because they fit certain categories of information:

Non-Public Email Addresses

Exemption 6 allows an agency to withhold "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The courts have held that the phrase "similar files" involves all information that applies to a particular person. Hertzberg v. Veneman, 273 F. Supp. 2d 67, 85 n.11 (D.D.C. 2003).

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To determine whether releasing requested information would constitute a clearly unwarranted invasion of personal privacy, we are required to perform a “balancing test.” This means that we must weigh the individual’s right to privacy against the public’s right to disclosure.

- (1) First, we must determine whether the individual has a discernable privacy interest in the information that has been requested.
- (2) Next, we must determine whether release of this information would serve “the public interest generally” (i.e., would “shed light on the performance of the agency’s statutory duties”).
- (3) Finally, we must determine whether the public interest in disclosure is greater than the privacy interest of the individual in withholding.

The information that we are withholding consists of the Secretary’s email address. We are withholding it based on our determination that the Secretary has a substantial privacy interest in the information that is not outweighed by the public interest to be served by its disclosure. *Shurtleff v. EPA*, 991 F. Supp. 2d 1, 39-40 (D.D.C. 2013).

In summation, we have determined that release of the information that we have withheld would constitute a clearly unwarranted invasion of the privacy of these individuals, and that it therefore may be withheld, pursuant to Exemption 6.

Portions of the enclosed documents have been redacted pursuant to Exemption 5 of the FOIA (5 U.S.C. § 552 (b)(5)) under the following privileges:

Confidential Commercial Information

Exemption 5 allows an agency to withhold “inter-agency or intra-agency memorandums or letters which would not be available by law to a party... in litigation with the agency” 5 U.S.C. § 552 (b)(5). As such, the Exemption 5 “exempt[s] those documents... normally privileged in the civil discovery context.” National Labor Relations Bd. v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975). The exemption incorporates the privileges that protect materials from discovery in litigation. These privileges include deliberative process, confidential commercial information, attorney work-product, and attorney-client. See *id.*; see also Federal Open Market Committee v. Merrill, 443 U.S. 340, 363 (1979) (finding a confidential commercial information privilege under Exemption 5).

Confidential Commercial Information Privilege

When the government enters the marketplace as an ordinary commercial buyer or seller, the government information is protected from competitive disadvantage under Exemption 5.

Government Land Bank v. General Services Administration, 671 F.2d 663, 665 (1st Cir. 1982). Exemption 5 prevails “where the document contains ‘sensitive information not otherwise available,’ and disclosure would significantly harm the government’s commercial interest.” *Id.* at 666; see also Merrill, 443 U.S. at 363.

Pursuant to the confidential commercial information privilege, conference call codes and passcodes have been withheld under Exemption 5. This information constitutes “intra-agency” documents because they are only shared with members of the Department of the Interior for the purpose of conducting official government business. Moreover, this information qualifies as “confidential commercial information” because the government entered the marketplace as an ordinary commercial buyer.

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In line with Land Bank and Merrill, the information is “sensitive and not otherwise available.” If the information was released, the government’s financial interest would be significantly harmed. The conference calls would no longer be private since unknown, non-governmental parties would have the ability to listen in to the calls. The funds spent on purchasing the information would therefore be wasted, and the information would be of no use.

Because we reasonably foresee that the release of this information would significantly harm the government’s financial interest by publicizing sensitive information, the Office of the Secretary is withholding it in accordance with Exemption 5 of the FOIA.

Tony Irish, Attorney-Advisor, in the Office of the Solicitor, was consulted in reaching this decision. Clarice Julka, Office of the Secretary FOIA Officer, is responsible for making this determination.

Sincerely,

Clarice Julka
Office of the Secretary
FOIA Officer